No. 09-1541

In the Supreme Court of the United States

VIETNAM VETERANS OF AMERICA, ET AL.,
PETITIONERS

v.

ERIC K. SHINSEKI, SECRETARY OF
VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

WILLIAM KANTER
CHARLES W. SCARBOROUGH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether veterans' organizations that have disclaimed any request for individual relief for any of their members have Article III standing to challenge alleged systemic delays in claims processing by the Department of Veterans Affairs.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Beamon v. *Brown*, 125 F.3d 965 (6th Cir. 1997) 9
Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 10
California v. *Rooney*, 483 U.S. 307 (1987) 10
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 6, 8
Dacoron v. *Brown*, 4 Vet. App. 115 (1993) 11, 12
Erspamer v. *Derwinski*, 1 Vet. App. 3 (1990) 2, 12
Fairchild v. *Hughes*, 258 U.S. 126 (1922) 8
Hunt v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977) 6
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 6, 8
Russell, In re, 155 F.3d 1012 (8th Cir. 1998) 9
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 6
Veterans for Common Sense v. *Nicholson*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008), appeal pending, No. 08-16728 (9th Cir. argued Aug. 12, 2009) 9
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 2
Webster v. *Doe*, 486 U.S. 592 (1988) 10, 11, 12

Constitution and statutes: Page

U.S. Const.:
Art. II, § 3 8
Art. III 5, 7, 8, 9
Amend. V (Due Process Clause) 3
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 704 ..... 4, 5
5 U.S.C. 706(1) 12
38 U.S.C. 502 11
38 U.S.C. 511 ..... 4, 5, 6, 9, 10, 12
38 U.S.C. 511(a) 3
38 U.S.C. 511(b)(1)-(3) 3
38 U.S.C. 5103(a)(1) 2
38 U.S.C. 5103A 2
38 U.S.C. 7101-7299 2
38 U.S.C. 7105(a) 2
38 U.S.C. 7105(d) 2
38 U.S.C. 7107 2
38 U.S.C. 7107(b) 2
38 U.S.C. 7252 2
38 U.S.C. 7253 2
38 U.S.C. 7261(a)(1) 2, 11
38 U.S.C. 7261(a)(2) 2, 11
38 U.S.C. 7261(a)(3)(B) 11
38 U.S.C. 7292(d) 11
38 U.S.C. 7292(d)(1) 3

In the Supreme Court of the United States

No. 09-1541

VIETNAM VETERANS OF AMERICA, ET AL., PETITIONERS

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 599 F.3d 654. The opinion of the district court (Pet. App. 18-25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2010. The petition for a writ of certiorari was filed on June 17, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has created a comprehensive scheme for providing disability benefits to veterans. The system of hearings, administrative appeals, and judicial review ensures that veterans have many opportunities to present their claims and to correct any error made in initial

determinations by the Department of Veterans Affairs (VA). See generally 38 U.S.C. 7101-7299.

A veteran must first submit a claim to one of 57 regional offices located around the country. See Pet. App. 2. The hearings at this stage are non-adversarial. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 309-310 (1985). Upon receipt of a substantially complete application for benefits, the VA must notify the veteran of the information necessary to substantiate the claim. 38 U.S.C. 5103(a)(1). The VA is required by statute to assist the veteran in obtaining all records relevant to the veteran's benefits claim and, when necessary, to provide a medical examination to assist the veteran in presenting the claim. 38 U.S.C. 5103A.

If a veteran is dissatisfied with the regional office's initial determination, he may appeal to the Board of Veterans' Appeals by filing a notice of disagreement. 38 U.S.C. 7105(a), 7107. Upon receipt of such notice, the regional office that reviewed the claim must prepare a more detailed explanation of its decision and provide that explanation to the veteran and his representative. 38 U.S.C. 7105(d). The record remains open at all times, and the veteran is entitled to a hearing before the Board makes its decision. 38 U.S.C. 7107(b).

A Board decision adverse to the claimant may be further appealed to the United States Court of Appeals for Veterans Claims (CAVC), a judicial body wholly independent of the VA. 38 U.S.C. 7252, 7253. The CAVC has authority to decide all legal issues, including constitutional claims, 38 U.S.C. 7261(a)(1), and is specifically authorized to compel action that the VA has "unlawfully withheld or unreasonably delayed." 38 U.S.C. 7261(a)(2); see *Erspamer* v. *Derwinski*, 1 Vet. App. 3, 7 (1990) (confirming that the CAVC has authority to grant

a writ of mandamus compelling the VA to take action that has been "unreasonably delayed"). Decisions of the CAVC may be further appealed to the United States Court of Appeals for the Federal Circuit, which is authorized to "decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. 7292(d)(1).

This system is the exclusive method of judicial review of VA benefits decisions. Congress has divested all other courts of authority to review such claims by directing the Secretary of Veterans Affairs to decide "all questions of law and fact necessary to a decision * * * under a law that affects the provision of benefits," and by providing that such decisions "may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise," except in accordance with the system of review described above. 38 U.S.C. 511(a).[1]

2. Petitioners Vietnam Veterans of America and Veterans for Modern Warfare, two veterans advocacy groups, filed a complaint in federal district court alleging system-wide delays in the VA's processing of benefits claims. Pet. App. 5-6. Asserting claims under the Administrative Procedure Act (APA), the Due Process Clause, and statutes directing the VA to act expeditiously in processing remanded benefits claims, petitioners sought an injunction requiring the VA to render "an initial decision on every veteran's claim for benefits within 90 days" and "to 'ensure that appeals of claims decisions are resolved within 180 days.'" *Id.* at 6 (quoting Compl. para. 88(a)-(b)). Petitioners sought only that

[1] Section 511 also provides for Federal Circuit review of VA rules and regulations, and excepts from its bar certain life insurance, housing, and loan matters not relevant here. 38 U.S.C. 511(b)(1)-(3).

structural remedy, and they explicitly disclaimed any request for relief for individual members whose claims had been delayed. See *ibid.* ("Nothing in this complaint is intended to, nor should it be construed as, an attempt to obtain review of an individual determination by the VA or its appellate system.") (quoting Compl. para. 16); see also Pet. 4 ("Petitioners do not challenge any particular decision made by the Secretary nor do they seek any specific decision in any particular case.").

The government moved to dismiss the complaint on several independent but related grounds. As principally relevant here, the government argued that petitioners lacked standing. The government noted that associational standing requires that at least one individual member of the plaintiff organizations have standing to bring the claims, and it contended that petitioners' express disclaimer of relief for any particular individual precluded them from satisfying that requirement. Gov't Memo. in Supp. of Mot. to Dismiss 15-17. The government also argued that petitioners' suit was barred on two statutory grounds: first, by 38 U.S.C. 511, which provides that the CAVC has exclusive jurisdiction to review "all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits," including preliminary decisions about when claims should be processed; and second, by the APA, which provides that a district court has jurisdiction to review agency action only when there is "no other adequate remedy in a court," 5 U.S.C. 704. Gov't Memo. in Supp. of Mot. to Dismiss 17-24. The government argued that Section 704 was not satisfied in this case because judicial review in veterans' benefits cases is available through the CAVC and the Federal Circuit. *Id.* at 20-21.

In an unpublished order, the district court granted the government's motion to dismiss the complaint for lack of standing. Pet. App. 18-25.

3. The court of appeals affirmed. Pet. App. 1-17. The court noted that the Sixth and Eighth Circuits have found unreasonable-delay claims by individual veterans to be non-cognizable under the APA, see 5 U.S.C. 704, because "any veteran can bring an unreasonable delay action in the CAVC." Pet. App. 10. While stating that the holdings of those courts "appear[] to be unassailable," *id.* at 11, the court of appeals declined to decide the case on that basis because it viewed the bar imposed by Section 704 as non-jurisdictional, see *id.* at 14-15.

The court of appeals instead affirmed the dismissal of petitioners' complaint on the ground that petitioners lacked Article III standing. Pet. App. 15-17. The court explained that petitioners, "in a rather apparent effort to avoid the preclusive bite of both [38 U.S.C.] 511 and [5 U.S.C.] 704," had gone "out of their way to foreswear any individual relief" for particular members of their organizations. *Id.* at 15-16. The court of appeals observed that "an association has standing to sue only if at least one member would have standing on his or her own right," *id.* at 15, and it concluded that petitioners could not satisfy that requirement.

The court of appeals recognized that petitioners, in an effort to demonstrate concrete injury from the VA's allegedly slow claims processing, had "produced affidavits of members whose cases were pending--in their view, much too long." Pet. App. 15. The court concluded, however, that those allegations of unreasonable delay in individual cases did not establish standing to seek the relief sought by petitioners: a system-wide injunction to reduce the average length of time expended

in processing veterans benefits claims. See *id.* at 15-16. The court observed that "the average processing time does not cause affiants injury; it is only their processing time that is relevant." *Id.* at 16. By way of example, the court explained that if "affiants fell at the quick-processing end of a bell-shaped curve, a high average processing time would be irrelevant to them," and that "a low average would not avoid injury if affiants were at the other side of the curve." *Ibid.* Thus, the court reasoned, petitioners had brought "a claim not for [affiants] themselves but for others, indeed, an unidentified group of others." *Ibid.* Because "one can not have standing in federal court by asserting an injury to someone else," the court concluded that petitioners lacked standing. *Ibid.* (citing *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 108-109 (1983)).

ARGUMENT

Petitioners argue that the decision below conflicts with this Court's decisions regarding associational standing and with the decisions of other courts of appeals regarding the scope of 38 U.S.C. 511. Those contentions are without merit, and further review is not warranted.

1. Petitioners' complaint was properly dismissed for lack of standing. Petitioners concede that an association has standing to sue only when "at least one member would have standing to sue in his own right." Pet. 16 (citing *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-343 (1977)). Petitioners' standing therefore depends on the existence of a member whose "concrete and particularized" injury would be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon* v.

Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)). Because petitioners chose to disclaim any request for relief for any of their individual members, the dismissal of their suit was a routine and fact-bound application of these settled principles.

Petitioners' complaint contains no allegations of delay in the processing of any particular benefits claim. Pet. App. 16. To the contrary, petitioners specifically declared that "[n]othing in this complaint is intended to, nor should it be construed as, an attempt to obtain review of an individual determination by VA or its appellate system." *Id.* at 6 (quoting Compl. para. 16). Petitioners have reiterated that position in this Court. See Pet. 4 ("Petitioners do not challenge any particular decision made by the Secretary nor do they seek any specific decision in any particular case.").

Petitioners allege only that the VA's claim-processing procedures are, in general, unlawfully slow, and they seek injunctive relief requiring that the VA act on claims within uniform, judicially-imposed deadlines. As the court of appeals explained, petitioners appear to have limited their request for relief in that manner in an "effort to avoid the preclusive bite of both [38 U.S.C.] § 511 and [5 U.S.C.] § 704," Pet. App. 16, which together make clear that a challenge to the VA's processing of individual veterans' benefits claims may not be brought in district court. By disclaiming any potential challenge to the VA's handling of any particular veteran's claim, however, and by instead directing their challenge at the VA's overall administration of the veterans' benefits scheme, petitioners have run afoul of Article III's "case or controversy" requirement.

Article III standing requirements rest in part on the principle that it is the responsibility of the Executive,

not the courts, to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3; see *Lujan*, 504 U.S. at 577 (explaining that Article III courts may not usurp "the Chief Executive's most important constitutional duty."). For this reason, no individual member of petitioners' organizations would have had standing to bring a suit that disavowed any request for relief in his specific case while insisting that the VA, on the whole, was taking too long to process claims. See *id.* at 560 n.1 ("[T]he injury must affect the plaintiff in a personal and individual way."). As the court of appeals recognized, even "assuming the alleged illegality—that the average processing time at each stage is too long—that 'illegality' does not cause [any particular individual] injury." Pet. App. 16.

An individual claimant suffers injury only if the processing of *his* claim is unlawfully delayed, an injury that petitioners have not asked any court to redress. Petitioners' suit seeks to enforce "only the right, possessed by every citizen, to require that the Government be administered according to law," which this Court has long held "does not entitle a private citizen to institute in the federal courts a suit." *Fairchild* v. *Hughes*, 258 U.S. 126, 129-130 (1922). An individual litigant who complained only of average claim-processing time would be "presenting a claim not for [himself] but for others, indeed an unidentified group of others." Pet. App. 16 (citing *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 108-109 (1983)).

Petitioners argue (Pet. 16-17) that the court of appeals ignored affidavits in the record that provide examples of individual members who had suffered delay in the processing of their claims. Petitioners do not, however, seek relief for any of those affiants; rather, their

complaint explicitly declares these affidavits to be merely "illustrative." Pet. App. 6 (quoting Compl. para. 16). Had these affiants brought suit in district court (either in their own name or as part of an association) to redress delays in the processing of their own cases, the Article III standing inquiry would be different (though 38 U.S.C. 511 would still bar the suit); but the affiants have not pursued any such claims. Far from ignoring petitioners' affidavits, the court of appeals parsed them with care but concluded that they failed to establish petitioners' Article III standing because petitioners "went out of their way to forswear any individual relief for the affiants." Pet. App. 16.

2. The decision below does not conflict with the holding of any other court of appeals. Two other circuits have considered lawsuits founded on similar allegations of systemic delay in the VA's processing of benefits claims. Both of those courts dismissed the plaintiffs' suits, though on statutory rather than constitutional grounds. See *In re Russell*, 155 F.3d 1012, 1013 (8th Cir. 1998) (per curiam); *Beamon* v. *Brown*, 125 F.3d 965, 967-974 (6th Cir. 1997).[2]

Petitioners assert (Pet. 20) that there is a disagreement among the circuits about the scope of the jurisdiction-limiting provisions of 38 U.S.C. 511. But this case is not an appropriate vehicle to address the

---

[2] Petitioners cite *Veterans for Common Sense* v. *Nicholson*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008) (*VCS*), appeal pending, No. 08-16728 (9th Cir. argued Aug. 12, 2009), for the proposition that organizational plaintiffs have standing to seek relief for systemic delays in the processing of VA benefits claims. Pet. 19. The district court in *VCS* did reject the government's standing argument, but the court held that 38 U.S.C. 511 divested it of jurisdiction over such claims. 563 F. Supp. 2d at 1083-1084.

coverage of Section 511 because the court below did not decide it. See Pet. App. 10. Petitioners argue (Pet. 20) that the court of appeals "[b]y necessity" decided the Section 511 question in its discussion of standing. That is incorrect. The court of appeals explained that there was "tension between" two lines of D.C. Circuit authority regarding the preclusive scope of Section 511, Pet. App. 10; see *id.* at 7 10, and it concluded that it "need not seek to resolve the tension between [its] cases" on that issue, *id.* at 10, because another ground of decision was available. The court of appeals affirmed the dismissal of petitioners' suit on the basis of standing alone. See *id.* at 15-16. This Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Because the court of appeals declined to rely on Section 511 as a ground for its decision, the fact that the court of appeals discussed Section 511 at all was a "mere fortuity." *Ibid.*

3. Finally, petitioners contend (Pet. 24) that the decision below raises a "serious constitutional question" under *Webster* v. *Doe*, 486 U.S. 592, 603 (1988), because it deprives benefits claimants of review of constitutional challenges to claim-processing delays. According to petitioners, judicial review of issues relating to veterans' benefits claims by the CAVC and the Federal Circuit is a constitutionally inadequate substitute for review by the district court.

This case is not a suitable vehicle for deciding whether the CAVC and the Federal Circuit provide an adequate forum for constitutional claims, however, because the court of appeals did not decide whether individual veterans' unreasonable delay claims may proceed in district court. As explained above, the court of ap-

peals discussed the statutory issues only in dicta. Pet. App. 11. The court did note that this Court's observation in *Webster*—that a "serious constitutional question * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," 486 U.S. at 603 (internal quotation marks omitted)—was likely irrelevant in this case because "even if review of the due process claim is not available in the district court, the CAVC could still hear it." Pet. App. 13-14 n.7. Nevertheless, the court of appeals' discussion of this issue was only "tentative" because the court dismissed petitioners' complaint solely for want of standing. *Id.* at 14.

In any event, the scheme that Congress has created for reviewing VA benefits decisions does provide a judicial forum in which a colorable constitutional claim can be heard. The CAVC may "decide all relevant questions of law," including whether "decisions * * * rules, and regulations" of the VA are "contrary to constitutional right." 38 U.S.C. 7261(a)(1) and (3)(B). The CAVC is also authorized to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. 7261(a)(2). A veteran may seek further review in the Federal Circuit, which has jurisdiction to consider all challenges to VA regulations and constitutional issues that arise in the course of the VA's adjudication of benefits claims. 38 U.S.C. 502, 7292(d).

Petitioners cite *Dacoron* v. *Brown*, 4 Vet. App. 115, 119 (1993), for the proposition that the CAVC "affords no * * * right of review to veterans seeking relief from the VA's delays." Pet. 25. Although the court in *Dacoron* confirmed the general rule that constitutional claims should be presented to the CAVC "in the context of a proper and timely appeal taken from such a decision

made by the VA Secretary through the [Board]," *ibid.* (quoting *Dacoron*, 4 Vet. App. at 119), the requirement of a final appealable decision does not apply when the plaintiff seeks an extraordinary writ such as mandamus. *Dacoron*, 4 Vet. App. at 119. To the contrary, the CAVC has held that it has jurisdiction to issue a writ compelling the VA to take action that has been "unreasonably delayed." *Erspamer* v. *Derwinski*, 1 Vet. App. 3, 7 (1990) (citation omitted). This is the same power that the APA authorizes district courts to exercise with respect to other federal agencies. 5 U.S.C. 706(1); see Pet. App. 11 (explaining that "the CAVC possesses the exact same authority to deal with excessive delay in its statute that district courts have under the APA").[3] Accordingly, Section 511's directive that specific statutory mechanisms be used to challenge VA benefit determinations is fully consistent with this Court's concern in *Webster* that there be a "judicial forum for a colorable constitutional claim." 486 U.S. at 603.

---

[3] Petitioners assert that, even if the CAVC may issue writs of mandamus compelling actions by the Board to prevent unwarranted delays on appeal, the CAVC will refuse to issue mandamus orders compelling expedited action by the regional offices. Pet. 26. That is incorrect. In *Erspamer*, the CAVC recognized its authority to issue a writ of mandamus where "the inadvertent or intentional failure of [the VA] to act prevents a claimant from ever attaining a [Board] decision which would be subject to review." 1 Vet. App. at 7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

WILLIAM KANTER
CHARLES W. SCARBOROUGH
Attorneys

AUGUST 2010